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No. 89-638

In The

Supreme Court of the United States

October Term, 1989

HARRY M. CARVALHO,

Petitioner,

v.

M/V ANDREA C, her engines, tackle, apparel and furniture; and ANDREA C FISHING CORPORATION, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER PETITIONER HAS STATED ADEQUATE GROUNDS UNDER SUPREME COURT RULE 17 FOR THIS COURT TO GRANT CERTIORARI.

II. WHETHER THE NINTH CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH THE PROTECTION HISTORICALLY AFFORDED SEAMEN BY THE DOCTRINE OF UNSEAWORTHINESS.

III. WHETHER THE NINTH CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH THE EXPRESS STATUTORY PROTECTION AFFORDED SEAMEN UNDER THE JONES ACT.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, HARRY M. CARVALHO, and Respondent ANDREA C FISHING CORPORATION, owner of the vessel M/V ANDREA C.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent ANDREA C FISHING CORPORATION, respectfully prays that writ of certiorari be denied to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 14, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been certified for publication. It is

attached in the appendix of Petitioner CARVALHO's Petition for Writ of Certiorari at page A-15.

The opinion of the United States District Court for the Southern District of California is only partially attached in the appendix of Petitioner CARVALHO's Petition for Writ of Certiorari at page A-1. The missing portion of the District Court opinion is in the Court's conclusion as follows:

(3) Plaintiff has not proved by a preponderance of the evidence defendant vessel was unseaworthy.

(4) Judgment shall be entered for defendant.

JUDITH N. KEEP, Judge
United States District Court

JURISDICTION

Petitioner asserted Federal jurisdiction in the District court under 46 U.S.C. Section 688 (The Jones Act) and under general maritime law. On appeal as of right by Petitioner, the Ninth Circuit affirmed the District Court's decision in all respects on July 14, 1989.

Petitioner now requests this Court review the decision of the Ninth Circuit pursuant to 28 U.S.C. Section 1254 (1). This Court's power to review pursuant to 28 U.S.C. Section 1254 (1) is discretionary in accordance with Supreme Court Rule 17 guidelines. This Court should refuse to exercise its power to review this case, as the issues raised herein meet neither the specific criteria for review nor the "special and important reasons" standard set forth in Rule 17. Rather, Petitioner seeks merely to

have this Court "retry" the factual determinations made by the District Court.

STATEMENT OF THE CASE

Petitioner was the navigation officer of the vessel M/V ANDREA C at the time of his accident on November 17, 1982. At the time of the injury, the Master of the vessel, Matt Giacalone, was working with Petitioner on a flatbed truck owned by a salt company and parked by the salt company on a dock in Panama. The truck bed had approximately 100 salt sacks stacked on it, which were to be unloaded from the truck and loaded onto the vessel.

Petitioner was not specifically ordered to unload the truck, but rather responded to a general request for assistance in unloading salt from the truck. Petitioner positioned himself on the flatbed and assigned himself the task to take the sacks off the back of the truck and throw them onto a cargo net on the ground. Sufficient men were available to help Petitioner on the flatbed. Petitioner's method of unloading salt was to pick up each rectangular salt sack by the corners of the long side, carry the bag across the truck bed, swing it out and drop it onto the cargo net spread on the dock below. This method of carrying the bags put strain on Petitioner's lower back, rather than on his thighs.

Petitioner had pre-existing back injuries of at least one bulging disc at L4-L5, discogenic disc disease and nerve root compression, but he never disclosed these back problems to Respondent prior to the accident. As Petitioner was lifting his first ten sacks, and perhaps only

his fifth or sixth sack, he experienced pain in his back.[1] Petitioner then sat down. His foot did not slip on salt, nor did he fall before he experienced pain in his back. He rested for ten days after this incident then resumed vigorous work for 108 days. He finally complained of his injuries in March of 1983, almost four months after the salt sack incident.

At trial, Petitioner contended he injured his back when he slipped on loose salt and fell. The District Court, however, found that Petitioner injured his lower back, which had been weakened by several prior injuries, when he lifted a salt bag, and that no negligence or unseaworthiness was involved. The District Court also specifically found that Petitioner did not slip and fall on loose salt, and that Respondent did not know of Petitioner's prior back injuries.

The Ninth Circuit affirmed the District Court, adopting the District Court's finding that a reasonably fit seaman is able to carry 100 pound sacks of salt. Moreover, it determined that the District Court's findings of no negligence or unseaworthiness were not clearly erroneous. The Ninth Circuit concluded that the work method employed in unloading the salt sacks was not inherently dangerous. In fact, Petitioner's own expert witness testified that the method of unloading salt sacks was reasonable and safe.

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[1] All facts stated here, except this particular fact, are listed in the District Court and Ninth Circuit findings at Appendix A to Petitioner's Brief. This particular fact was stated by Petitioner at trial in the transcript at pages 806, 922-23.

REASONS FOR NOT GRANTING THE WRIT

I.

PETITIONER CARVALHO HAS NOT STATED GROUNDS UNDER SUPREME COURT RULE 17 FOR THIS COURT TO GRANT CERTIORARI

Petitioner has not stated any compelling grounds for this Court to grant Certiorari. Supreme Court Rule 17 states that this Court, in its discretion, can grant review on writ of certiorari for splits of authority, decisions on "important questions" of federal law, departure by a court of appeal from the accepted and usual course of judicial proceeding, to exercise its supervisory powers, or for any other "special and important" reason. Petitioner's request does not fall within any of the grounds enumerated in Rule 17, and is hardly a case so "special" or "important" to warrant this Court's attention. Simply stated, Petitioner wants this court to retry settled findings and overturn existing, settled law, or not apply it to Petitioner, because its application to Petitioner, in his view, would be unfair.

Petitioner contended at trial he slipped and fell. In the face of the District Court findings, Petitioner has now abandoned that theory and has pressed a new theory in the Ninth Circuit and here. Petitioner's new theory is that the work method which allegedly required him to carry 100-pound sacks of salt a short distance for "45 minutes to an hour" constituted unseaworthiness or vessel owner negligence. Petitioner's factual premises for this argument, however, are at odds with the District Court's findings, and existing law. *See Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967).

The relevant facts as found by the District Court and affirmed by the Ninth Circuit are as follows: Petitioner assigned himself to move salt sacks and was injured due to a pre-existing back injury (See page A-19 of Petitioner's Brief); a reasonably fit seaman could perform the same salt-moving task (See page A-21 of Petitioner's Brief); and Petitioner failed to inform Respondent of his prior back injuries (See page A-10 of Petitioner's Brief).

Petitioner now disputes, or at least disregards, these findings of fact. In short, Petitioner would have the United States Supreme Court review and retry the facts in this case. This is not a compelling basis for granting writ of certiorari under Supreme Court Rule 17.

II.

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT IN PRINCIPLE WITH THE PROTECTION HISTORICALLY AFFORDED SEAMAN BY THE DOCTRINE OF UNSEAWORTHINESS

As a premise to this issue, Petitioner incorrectly states the Ninth Circuit and District Court's decisions. The District Court specifically found: "There is no evidence the Captain or owners of the ANDREA C were aware of the nature and extent of plaintiff's lower back problems." (See page A-10 of Petitioner's Brief.) Without this knowledge, a vessel is not required to protect or indemnify a seaman for injuries resulting from hiring employees who are physically or emotionally unable to perform their duties. *OSCEOLA*, 189 U.S. 158 (1903); *Boudin v. Lykes Brothers Steamship Co.*, 348 U.S 336 (1955). Therefore, the Ninth Circuit decision affirming the District Court does not conflict in principle with an historical

duty to protect seamen, but rather focuses on the requirement of an actionable nexus between the vessel and the seaman.

III.

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT IN PRINCIPLE WITH THE EXPRESS STATUTORY PROTECTION AFFORDED SEAMAN UNDER THE JONES ACT

The Jones Act of 1920, currently codified as 46 U.S.C. Section 688 (1976), permits recovery against a vessel for a breach of duty that produces injury to a seaman. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957). Applying this test, the Ninth Circuit here determined that the District Court's findings of fact did not support a breach of duty by Respondent. (See pages A-14 and A-22 of Petitioner's Brief.) Instead, the District Court found that a reasonably fit seaman can be expected by his employer to safely lift and move 100 pound sacks of salt. (See page A-22 of Petitioner's Brief.)

As a premise to this issue, Petitioner incorrectly states the evidence to the effect Petitioner was injured after 45 minutes to one hour of moving salt sacks. In fact, Petitioner himself testified at trial that he carried only five or six bags of salt, at most ten, before he was injured. (See *supra* note 1.) In addition, the District Court determined, and the Ninth Circuit affirmed, that a reasonably fit seaman can carry multiple bags of salt over time, given that the District Court used the word "bags", not "bag". (See page A-10 of Petitioner's Brief.) In any event, Petitioner admits in his Brief he failed to elicit testimony or to request a specific finding on this allegedly "critical" issue

of how long Petitioner could safely carry the salt sacks. Rule 17 does not permit Petitioner now, for the first time, to raise his own failure to provide adequate evidence at trial as a basis to gain access to review by the Supreme Court on Writ of Certiorari.

IV.

CONCLUSION

Respondent respectfully requests, for the reasons stated, that the Petition for Writ of Certiorari be denied.

DATED: November 10, 1989

Respectfully submitted,

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